

Collins (Migration) [2022] AATA 3264 (22 August 2022)

CORRIGENDUM

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Keane Collins
REPRESENTATIVE:	Mr Alexander Haridimos (MARN: 1461630)
CASE NUMBER:	2111251
HOME AFFAIRS REFERENCE(S):	BCC2021/174386
MEMBER:	David Crawshay
DATE OF DECISION:	22 August 2022
DATE CORRIGENDUM SIGNED:	25 August 2022
PLACE OF DECISION:	Melbourne
AMENDMENT:	The following corrections are made to the decision:

The words "*The Tribunal has concluded that the matter should be remitted for reconsideration*" at paragraph 7 should be replaced with "*The Tribunal has concluded that the matter should be affirmed*".

Statement made on 25 August 2022 at 2:34pm

David Crawshay
Member

- 1.
- 2.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Keane Collins

REPRESENTATIVE: Mr Alexander Haridimos (MARN: 1461630)

CASE NUMBER: 2111251

HOME AFFAIRS REFERENCE(S): BCC2021/174386

MEMBER: David Crawshay

DATE: 22 August 2022

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Statement made on 22 August 2022 at 10:06am

CATCHWORDS

MIGRATION – Working Holiday (Temporary) (Class TZ) visa – Subclass 417 (Working Holiday) – bogus document – altered bank transaction statements – compassionate or compelling circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5(1), 57, 65, 359, 363, 379

Migration Regulations 1994, Schedule 2, cl 417.211; Schedule 4, Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Hasran v MIAC [2010] FCAFC 40

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 9 August 2021 to refuse to grant the applicant a Working Holiday (Temporary) (Class TZ) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 29 January 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.417.221(2)(b) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The delegate found that the applicant did not satisfy Public Interest Criterion ("PIC") 4020.
5. On 5 August 2022, the Tribunal wrote to the applicant pursuant to s.359(2) of the Act, in the following relevant terms:

On 9 August 2021, a delegate of the Minister for Home Affairs refused a visa that you applied for on 29 January 2021 because the delegate was not satisfied that you met Public Interest Criterion 4020.

In light of this refusal and the reasons given for it, the Tribunal requests you to provide information that:

- you satisfy Public Interest Criteria 4020(1) or 4020(2); and/or
- there are:
 - compelling circumstances affecting the interests of Australia; or
 - compelling or compassionate circumstances affecting the interests of an Australian citizen, Australian permanent resident or eligible NZ citizen,

that justify the granting of the visa that is under review such that the Tribunal waive the requirements of PIC 4020(1) or 4020(2).

6. The invitation was sent to the last address provided in connection with the review and advised that, if the information was not provided in writing by 19 August 2022, the Tribunal may make a decision on the review without taking further steps to obtain the information and the applicant would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments. The last address provided in connection with the review was the email address of the applicant's representative as his authorised recipient under s.379G(1). Upon sending the invitation to that address, however, the Tribunal became aware via a "return-to-sender" message that the invitation was not delivered. It took the step of sending the invitation to the applicant at the email address provided in his application for review form of 26 August 2021, pursuant to s.379G(2). This also occurred on 5 August 2022. The Tribunal has not been informed of any changes to the applicant's email address.
7. The review applicant has not provided the information within the prescribed period and no extension has been granted. In these circumstances, s.359C applies and pursuant to s.360(3) the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40.

8. The Tribunal has decided to proceed to a decision without taking further steps to obtain the information for two reasons. Firstly, the consequences of not providing the information by the due date were clearly set out in the Tribunal's letter to the applicant's representative (and copied to him) of 5 August 2022. Secondly, the applicant has not engaged with the Tribunal since an application for review form was submitted on his behalf on 26 August 2021, and this follows a pattern of disengagement whereby he had previously failed to respond to the Department's s.57 "natural justice" letter on 6 July 2021.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.417.221(2)(b) for the grant of the visa. Broadly speaking, this requires that there be no evidence that the applicant has given, or caused to be given, to certain people or authorities, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1). There are additional requirements that need to be met if the applicant is able to satisfy PIC 4020(1).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term "information that is false or misleading in a material particular" is defined in PIC 4020(5) and the term "bogus document" is defined in s.5(1) of the Act. In contrast to the definition of "information that is false or misleading in a material particular" in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a "false or misleading" statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The delegate's decision in this matter relevantly stated as follows in relation to the purported bogus document supplied by the applicant:

Department checks indicate that the ANZ bank transaction statements provided as evidence of specified work completed with the above employer, may be a bogus document, as the issuing authority (ANZ Bank) has verified the bank transaction statement supplied by the applicant, is a false statement.
14. An email dated 4 July 2021 from an employee of ANZ to an officer of the Department relevantly stated as follows:

Yes, KEANE COLLINS is the holder of the mentioned account, and the statements provided does [sic] not match our records.
15. This email was in response to an email from the aforementioned Department officer dated 28 June 2021 which purported to attach bank statements for the period 30 January 2020 until 30 July 2020. It sought the employee's assistance to verify if the applicant was an account holder and, if yes, whether credit transactions for "ADVANTAGE LABOUR ADVANTAGE WAGES" on the attached transaction statements matched the records of the ANZ.

16. The Tribunal has considered the information in front of it. It accepts that an officer of the Department sent statements purportedly from the applicant's bank account to an employee of the ANZ to verify and that this verification process concluded that the statements did not match the bank's records.
17. Based on the information and the above findings, the Tribunal finds that, in providing three statements purportedly from his bank account, the applicant has given, or caused to be given, documents that it reasonably suspects are counterfeit or have been altered by a person who does not have authority to do so.
18. The Tribunal therefore finds that the applicant has given, or caused to be given, a bogus document.
19. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) be waived?

20. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
21. The expressions "compelling circumstances" and "compassionate or compelling circumstances" are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of "compassionate" relates to feelings of sympathy, sorrow, pity or concern for others.
22. The Tribunal notes that no information has been received from the applicant that would address the question of whether the waiver under PIC 4020(4) should be exercised. This is despite being invited to do so twice – firstly, in the Department's s.57 "natural justice" letter of 6 July 2021 and more recently in the Tribunal's s.359(2) letter of 5 August 2022.
23. Based on the information in front of it, the Tribunal is not satisfied that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen.
24. The Tribunal finds that the waiver in PIC 4020(4) should not be exercised.
25. As the applicant does not satisfy PIC 4020(1) and the waiver in PIC 4020(4) should not be exercised, he does not satisfy PIC 4020 for the purposes of cl.417.221(2)(b).

NON-DISCLOSURE CERTIFICATE

26. The Tribunal became aware of the existence of a non-disclosure certificate pursuant to s.375A that was placed on a document within the Department file (refer Trim number ADD2022/3928355). This document comprised the email chain referred to in paragraphs 12 and 13 above. Section 375A was said to apply to the document as it would be contrary to the public interest. Three reasons were given as to why it would be contrary to the public interest, although the Tribunal discerns that two of these reasons are not valid – namely, it would disclose, or enable a person to ascertain, the existence or identity of a confidential

source of information, and it was provided “in confidence” and the provider of the information has not consented to its disclosure to the applicant. Nonetheless, it considers that the remaining reason for its being contrary to the public interest – namely, it would disclose lawful methods for preventing, detecting and investigating breaches or evasions of the law which would be likely to prejudice the effectiveness of those methods – is a valid reason. As such, the Tribunal accepts that the certificate is valid.

27. On 12 August 2022, the Tribunal sent a letter to the applicant’s representative, copying in the applicant for the reasons detailed above, which enclosed the aforementioned s.375A certificate. The letter explained that the Tribunal considered the certificate to be valid for the reasons given above. It also stated that it did not consider that the Department folios on which it was placed revealed any information that should have been disclosed to him formally under s.359A. It specifically stated that the document the subject of the certificate pertained exclusively to the enquiry into the genuineness of the bank account statements submitted by the applicant and the ensuing verification process undertaken by an employee of the ANZ, which was particularised in the delegate’s decision. It stated that the information contained in the document therefore fell under the exception in s.359A(4)(b) relating to information that the applicant gave for the purposes of the application for review. It reminded the applicant that, as he had provided a copy of the delegate’s decision to the Tribunal, he was taken to have provided this information for the purposes of the application for review.
28. The letter sought the applicant’s comment about the validity of the certificate and gave him until 19 August 2022 to do so. At the time of this decision, however, no such comment was received.

DECISION

29. The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

David Crawshay
Member